Supreme Court, U.S.
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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1995

ANTONIO DUEÑAS,

PETITIONER

VS.

DONNA E. SHALALA,
SECRETARY OF HEALTH
AND HUMAN SERVICES,

RESPONDENT

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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6588

QUESTIONS PRESENTED

1. May the Secretary of Health and Human Services shift the burden of fully and fairly developing the record to Petitioner? In Brown v. Heckler 713 F. 2d 441 (9th Cir. 1983) the Court stated the ALJ's duty to fully and fairly develop the record and to assure that Applicant's interests are considered "exists even when the claimant is represented by counsel." The Administrative Law Judge ("ALJ") shifted the duty to Petitioner of ascertaining earnings in the United States for the period 1952-1954 instead of issuing a scouting order as was done for the years 1955-1975. Petitioner wrote a letter stating where he worked in the United States in the period 1952-1954. The Administration did not follow through on this evidence as required. It would appear the United States Court of Appeals

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ANTONIO DUEÑAS,

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VS.

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SECRETARY OF HEALTH
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RESPONDENT

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Petitioner, ANTONIO DUEÑAS, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of

Appeals for the Ninth Circuit (1) finding that he only had thirty-three (33) of the required thirty-seven (37) quarters of coverage for Social Security retirement insurance benefits, (2) that the Administrative Law Judge ("ALJ") did not secure earnings for the period 1952-1954 even though this information was furnished the Administration, and (3) the Administration lost the list of companies where Dueñas worked for the period 1952-1954 and did nothing to rectify this loss.

OPINIONS BELOW

The unpublished Memorandum Opinion of the United States Court of Appeals for the Ninth Circuit is entitled ANTONIO DUEÑAS v. DONNA E. SHALALA, Secretary of Health and Human Services, Number 92-56566, and

appears in Appendix A to this Petition. The unpublished written opinion of United States District Court, Central District of California, appears in Appendix B to the Petition. The unpublished recommended ruling of the Magistrate Judge, adopted by the United States District Court, Central District of California, appears in Appendix C.

JURISDICTION

The Court of Appeals Opinion in this matter was filed on May 12, 1994. A timely Petition for Rehearing was filed on May 24, 1994. The Petition was not acted on. On September 10, 1994 on the recommendation of the Court of Appeals Petitioner filed Motion to Recall Mandate issued by the Court. On September 10, 1994 Petitioner refiled Petition for Rehearing. On November 25, 1994 the Court of Appeals denied the Petition for Rehearing and is set forth in Appendix D. This Court's jurisdiction is invoked under Title 28, U.S.C. Section 1254(1).

NINTH CIRCUIT COURT OF APPEALS CASE LAW

In Brown v. Heckler 713 F. 2d 441 (1983) the Court emphasized that the ALJ's duty to fully and fairly develop the record and to assure applicant's interests are considered "exists even when the claimant is represented by counsel." It would appear that the ALJ may not shift the burden of developing the case to Petitioner and the Court of Appeals should not discriminate in the application of its own law.

STATEMENT OF THE CASE

The United States District Court, Central District of California, had jurisdiction pursuant to Section 205(g) of the Social Security Act (42 U.S.C.

405(g)).

ANTONIO DUEÑAS was born on June 5, 1926 in the United States but was taken to Mexico by his parents while a youth. He returned to the United States and worked in agriculture and other seasonal occupations. He cannot communicate in the English language.

On April 21, 1988 Petitioner ("DUEÑAS") filed an application for Social Security retirement insurance benefits at the United States Embassy in Mexico. On August 23, 1988 the Administration informed DUEÑAS that he was not eligible for retirement insurance benefits because he had only thirty-three (33) of the required thirty-seven (37) quarters to be fully insured. On September 19, 1988 DUEÑAS sent a letter to the Administration informing it of his work in the United

States in the years 1952-1954 which had not been considered. He named the cities and towns where he had worked during that period and stated he had had his Social Security card since 1952. The Administration informed DUEÑAS that the work in 1952-1954 was under contract and not covered under Social Security. This statement that DUEÑAS' employment during the period 1952-1954 was not covered was subsequently determined erroneous as DUEÑAS, being a United States citizen, was not subject to Section 210(a) of the Social Security Act.

On November 8, 1988 the Administration instituted a Scouting Request for DUEÑAS' earnings record. Earnings were provided for the years 1955-1975. On February 1, 1989 DUEÑAS informed the Administration it had not produced

earnings for the period 1952-1954 and enumerated the places where he had worked. On February 5, 1989 DUEÑAS wrote a letter in Spanish to the Administration and submitted names of cities and states where he had worked in the period 1952-1954. This letter/evidence is not part of the official administrative record and must be considered as lost by the Administration.

At a scheduled hearing on April 26, 1990 no testimony was taken, but the ALJ requested counsel to try to contact some of DUEÑAS' employers during the period 1952-1954. Counsel contacted the California Agricultural Board and a few of the legal service agencies in Northern California which deal with agricultural workers but was not successful. On May 31, 1990 the ALJ issued a decision finding DUEÑAS had only thirty-three (33) of the

thirty-seven (37) quarters of coverage required for fully insured status.

Following a timely Request for Review the Appeals Council remanded the matter on December 12, 1990 directing the ALJ to attempt to secure records of employment with ROBERTO LEGORRETA and/or other evidence showing DUEÑAS received remuneration for services rendered. Following a hearing on March 28, 1991 the ALJ issued a decision on April 17, 1991 finding DUEÑAS had only thirty-three (33) of the required thirty-seven (37) quarters to be fully insured, that ROBERTO LEGORRETA never employed DUEÑAS and it is highly unlikely DUEÑAS did any work in 1986, 1988 or 1989. A notarized statement from MANUEL MENDOZA dated April 21, 1991 was filed with the Request for Review by the Appeals Council showing he paid DUEÑAS

$875 for four and one-half weeks of work during August and September 1984. On November 8, 1991 the Appeals Council denied the Request for Review.

A timely Complaint was filed in the United States District Court, Central District of California, on November 19, 1991. Following submission of Motion for Summary Judgment by parties oral argument was held on June 19, 1992. On June 26, 1992, at the request of the Court, counsel submitted Memorandum of Points and Authorities on the Duty of the Administrative Law Judge to Fully Develop a Record to Assure that Claimant's Interests Are Considered. On September 24, 1992 the Magistrate Judge issued Notice of Filing of Magistrate Judge's Report and Recommendations and the Lodging of Proposed Judgment recommending judgment

be entered for defendant. On October 1, 1992 DUEÑAS filed Objections to the Report and Recommendation and the Proposed Judgment. On October 21, 1992 the United States District Court adopted the findings, conclusions and recommendation of the United States Magistrate Judge and ordered that Judgment be entered in favor of defendant. On October 23, 1992 judgment was entered in favor of defendant.

A timely appeal was filed in the United States Court of Appeals for the Ninth Circuit on December 1, 1992. After submission of briefs Defendant moved that a decision be issued on the briefs without oral argument. On April 23, 1994 Appellant requested that the Denial of Oral Argument be reconsidered and oral argument be permitted. This request was

denied. On May 12, 1994 the United States Court of Appeals for the Ninth Circuit issued Memorandum affirming the judgment of the District Court. On May 24, 1994 DUEÑAS filed Petition for Rehearing. The petition was not acted on. Instead the Appeals Court issued Mandate. On September 10, 1994, at the recommendation of the Appeals Court, DUEÑAS filed Motion to Recall Mandate and Motion that He Be Allowed to Refile His Petition for Rehearing. On November 25, 1994 Appellant's motion to recall the mandate was granted and the petition for rehearing was accepted for filing and denied.

REASONS FOR GRANTING THE WRIT

Certiorari should be granted for two reasons: (1) This Petition presents an issue that may affect the general public interest—May the United States Court of Appeals for the Ninth Circuit discriminate in application of its own case law, and (2) may the Secretary of Health and Human Services lose material evidence and do nothing to rectify the loss?

The Ninth Circuit Court of Appeals has emphasized that the duty of the Administrative Law Judge to fully and fairly develop the record to assure claimant's interests are considered exists even when claimant is represented by counsel (Brown, supra). The Secretary may not—and must not—shift this duty/burden to

counsel. It would appear that in this case the duty/burden was shifted to counsel. The Secretary is in a better position to assume this duty than counsel to protect a claimant and this would appear to be the underlying reason for the Court's emphasis on this special duty.

The Secretary shifted the duty of fully developing the record and erred in not issuing a scouting order for the earnings in the work period 1952-1954 and dismissed this work period with a statement that under Section 210(a) of the Social Security Act this employment was not covered by Social Security and, in effect, admitted the Administration was knowledgeable about this employment. The Secretary knew when and where this employment took place. The Secretary was informed DUEÑAS was an American citizen by

birth and, therefore, his employment in the United States was covered under the Social Security Act. When so informed the Secretary had a duty to rectify the error of dismissing the employment period 1952-1954 as not covered employment and to issue a scouting order for a record of that employment. This was not done even though DUEÑAS had submitted evidence of this employment in the "attached photocopy" to his letter to the Administration. This "photocopy" evidence is not part of the official record as required and the Secretary must be directed to produce it or the matter remanded for opportunity for DUEÑAS to reproduce the employment record for the years 1952-1954. Remand is considered appropriate where evidence in possession of the Secretary is lost. In Englehart v.

Schweiker 558 F. Supp. 112 (D.S.D. 1983) the Court held it had no choice but to remand the case because the Secretary had lost the tape of Plaintiff's Administrative hearing. Loss of material evidence is as important, or more so, as loss of the hearing tape.

By not fully and fairly developing the record as required and by losing important material evidence DUEÑAS, an American-born citizen, is being deprived of the equal protection of the laws of his country, the United States of America.

This case presents a substantial issue: A United States citizen's entitlement to Social Security retirement insurance benefits when he has worked for these benefits. There is also a novel legal issue present: The Secretary erroneously dismissed the claim for

retirement insurance benefits stating the employment for the period 1952-1954 was not covered because he was an agricultural worker under contract. This employment, in all probability, would give him the required quarters to be fully insured to receive the retirement benefits. The Secretary lost important material evidence and did nothing in an attempt to reproduce this evidence but instead took a "so what?" attitude as, "He doesn't speak English so he won't do anything about it." DUEÑAS has been denied his due process rights. The Appeal Court's Memorandum contained some factual errors. The Appeals Court stated there is no support for the assertion that DUEÑAS worked for companies listed in the "attached photocopy" of his letter to the Administration and stated the photocopy is

not part of the record. The Appeals Court further stated DUEÑAS provided the names of employers for the period 1955-1975 which led the Secretary to issue a "request for scouting" to develop the relevant facts concerning employment by these employers. In like manner, had the Secretary not lost the photocopy showing companies DUEÑAS worked for in the period 1952-1954 a scouting order would have issued for development of the relevant facts concerning employment in the period 1952-1954.

The development of the factual and legal points in this case would appear to be in the public interest in that the Secretary would be put on notice that she may not shift the burden/duty of fully and fairly developing the record to assure a claimant's interests are considered and

that she must attempt to reproduce evidence she has lost, or at least rectify the loss. On the other hand, the public would be aware that in an administrative hearing for benefits under the Social Security Act the Court would enforce the Secretary's special duty to fully and fairly develop the record and make an effort to reproduce evidence she has lost. This vigilance by the Court will preserve a claimant's due process rights.

The United States Supreme Court should grant Certiorari to explicitly rule that the Secretary of Health and Human Services must assume the duty of fully and fairly developing the record to assure that a claimant's interests are considered and may not shift that special duty of development. The Secretary must also be directed, when she has lost material

evidence, to rectify that loss by requesting that a claimant reproduce that evidence or by scheduling a hearing to obtain that evidence. Loss of material evidence by the Secretary must not be flagrantly disregarded.

CONCLUSION

For the reasons set forth above, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit.

DATED: February 14, 1995 Respectfully submitted,

Stephanie M. Simpson

Stephanie M. Simpson
Attorney for Petitioner

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1995

NO._____

ANTONIO DUEÑAS,

PETITIONER

V.

DONNA E. SHALALA,
SECRETARY OF HEALTH AND
HUMAN SERVICES,

RESPONDENT

CERTIFICATE (PROOF) OF SERVICE

I hereby certify that I served the within Petition for a Writ of Certiorari on each party in the above proceeding, or that party's counsel, and on every other person required to be served by depositing an envelope containing the above documents in the United States mail properly addressed to each of them and with first-class postage prepaid.

The names of addresses of those served are as follows:

Solicitor General
Department of Justice
Washington, D.C. 20530

General Counsel
Department of Health and Human Services
200 Independence Avenue SW
Washington, D.C. 20201

Executed on February 16, 1995, at Northridge, California.

I declare under penalty of perjury that the foregoing is true and correct.

Stephanie M. Simpson
Attorney for Petitioner

APPENDIX A

NOT FOR PUBLICATION
IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ANTONIO DUEÑAS,	
Plaintiff-Appellant	C.A. No. 92-56566 D.C.No.CV-91-6301-JSL
v.	MEMORANDUM*
DONNA E. SHALALA,** Secretary of Health and Human Services,	
Defendant-Appellee.	

Appeal from the
United States District Court
for the Central District of California
J. Spencer Letts, District Judge,
Presiding

Submitted May 6, 1994***
Pasadena, California

Before: KOZINSKI and TROTT, Circuit Judges, and LEVI, District Judge.****

Antonio Dueñas applied unsuccessfully for old-age (retirement) insurance

benefits. In denying the claim, the Secretary of Health and Human Services ("Secretary") found that Dueñas had failed to establish the requisite 37 quarters of coverage. The district court granted summary judgment to the Secretary and this appeal follows. We have jurisdiction under 28 U.S.C. § 1291 and affirm.

I

Antonio Dueñas applied for retirement benefits on April 21, 1988, after reaching the age of 62. (R. 71-76.) The Secretary found that Dueñas had only 33 of the required 37 quarters of coverage necessary for fully-insured status and thus that he was not eligible for retirement benefits.[1]

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[1] *This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

**Secretary Donna E. Shalala is substituted for her predecessor, Louis W. Sullivan, M.D., pursuant to Federal Rule

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of Appellate Procedure 43(c) (1).

***The panel unanimously finds this case suitable for decision without oral argument. Fed. R. App. P. 34(a); 9th Cir. R. 34-4.

****The Honorable David F. Levi, United States District Judge for the Eastern District of California, sitting by designation.

[3]The parties do not dispute that Dueñas required 37 quarters of coverage consisting of one quarter for each year after 1950 and before 1988 when he turned 62. 42 U.S.C.. S 402(a) & 414(a) 20 C.F.R. §§ 404.110(b)(2), 404.115(b).

[4]In his request for reconsideration, Dueñas states that after 1954 he returned to Mexico and then came back to the United States "working in the companies listed in the attached photocopy." (R.79.) The photocopy is not part of the record. Counsel for Dueñas asserts that the attachment may have listed the employers' for whom Dueñas claims coverage in the period 1952-54. There is no support for this assertion in the record and it is inconsistent with Dueñas' repeated inability to specify the names of his employers. It does appear, however, that Dueñas provided the names of employers for the period 1955-75, which led the Secretary to issue a "reguest for scouting" to develop the relevant facts concerning Dueñas' employment by these

On September 19, 1988, Dueñas sought reconsideration of the denial based on the Secretary's failure to count work performed by him in the period 1952 to 1954. (R. 78-79.) Dueñas stated in his request for reconsideration that he had worked as a seasonal agricultural laborer during this period in various states which he identified. But he did not provide the names of any of his employers.[2] The request for reconsideration was denied on March 17, 1989, on the erroneous ground that Dueñas was a foreign agricultural worker in the period 1952-54. (R. 81-84.)[3]

Dueñas then requested a hearing

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employers. (R. 90-92.)

[3]This decision was erroneous because 5 210(a)(1) of the Social Security Act, 42 U.S.C. 5 410(a)(1), on which the Secretary relied, applies to foreign agricultural workers who are not citizens of the United States. Dueñas is a United States citizen.

before an Administrative Law Judge ("ALJ"). (R. 85-87.) After a postponement to permit Dueñas to retain counsel, the ALJ held a hearing on April 26, 1990. Counsel for Dueñas appeared and requested that the record be held open so that she could attempt to get evidence that Dueñas was employed in the period 1952-54. Counsel stated that she would seek to identify and then contact Dueñas' past employers. The ALJ readily agreed to the request and held the record open for 30 days during which time counsel could advise the ALJ as to her progress in her investigation.[4] At the hearing, no request was made by counsel that the ALJ develop the record any further. Counsel acknowledged that in view of the record, the ALJ would have no choice but to deny the petition. (R. 45-46.) During the

period in which the record was held open, counsel for Dueñas submitted a "statement of employer," completed by Roberto Legorreta stating that he had employed Dueñas during the years 1978, 1980, 1983, 1986, 1988, and 1989. (R. 102-107.) No further information was provided concerning Dueñas' claimed employment during 1952-54, and no request was made of the ALJ to develop the record or to hold the record open for a further period of time.

On May 31, 1990, the ALJ closed the record and found that Dueñas was not entitled to benefits and that Legorreta's statement, even if true, would not change the calculation of covered quarters. (R. 25-27.) The Appeals Council did not concur with this last conclusion and remanded for a determination of whether

there was a bona fide employment relationship between Legorreta and Dueñas. In remanding the matter, the Appeals Council noted that in his application for benefits Dueñas had not claimed employment during 1986, 1987, or 1988, and had not mentioned employment by Legorreta in a further statement concerning his prior employment. (R. 19-20 (citing R. 95).)

On remand the ALJ received additional materials from Legorreta, including a declaration and a response to questions posed to him in writing by the ALJ. (R.110, 112.) In the declaration, Legorreta averred that he paid Dueñas wages in cash in the amount of $325 in 1978, $295 in 1980, $444 in 1983, $625 in 1986, $775 in 1988, and $825 in 1989. In his answers to the ALJ's written questions, however, Legorreta stated that

he had no records and was unable to state how he had arrived at the specific wage amounts for each year as stated in his declaration. Because of these discrepancies, and because Dueñas had stated on his application that he had not worked in 1988 or 1986, the ALJ held a supplemental hearing and heard testimony from Legorreta and Dueñas. (R. 48-70.) In her decision of April 17, 1991, the ALJ again found that Dueñas had only 33 of the required 37 quarters of coverage. (R. 10-15.) Based on the testimony and the documentary record, the ALJ concluded that Dueñas was never the employee of Legorreta. The two were cousins, and on occasion Legorreta, who worked as a casual laborer, would ask Dueñas to join him on a job. The ALJ also found that Dueñas had failed to establish that he was employed

during any of the years in question or the amounts of money earned in those years. The ALJ concluded that in fact it was highly unlikely that Dueñas did any work in 1986, 1988, or 1989. (R. 14.)

Dueñas again sought review by the Appeals Council. He argued that Legorreta was his employer and also provided a new statement--notarized but unsigned--from Manuel Mendoza to the effect that Mendoza had employed Dueñas in 1984. (R. 115-119, 114.) The Appeals Council denied the request for review, (R. 3-4,) and Dueñas timely appealed to the district court. The district court adopted the report and recommendation of the assigned magistrate judge, and ordered that judgment be entered in favor of the Secretary. We now review that decision on claimant's timely appeal.

II

The decision of the district court granting summary judgment is reviewable de novo. Matthews v. Shalala, 10 F.3d 678, 679 (9th Cir. 1993). The Secretary's findings of fact are conclusive if supported by substantial evidence. 42 U.S.C. § 405(g). Dueñas disputes the Secretary's finding of only 33 quarters of coverage on three grounds: (1) the ALJ failed to develop the record on Dueñas' alleged employment during the years 1952-1954 and the information provided by Dueñas was sufficient to find coverage for those years (2) the ALJ incorrectly determined that Legorreta and Dueñas were not in an employer-employee relationship and (3) the ALJ erred in refusing to credit Mendoza's statement as evidence of

two quarters of employment in 1984. These contentions are without merit.

First, as to the period 1952-54, Dueñas provided only sketchy information as to his employment. He recalled neither for whom he worked nor what he had earned. All that Dueñas provided was a list of states and harvests in which he had worked. Following a hearing before the ALJ, counsel for Dueñas specifically undertook to develop further information concerning Dueñas' employers and was unsuccessful. No request was made of the ALJ to develop the record, and it is unclear what further the ALJ could have done in the absence of an identification of the alleged employers. By contrast, when such identifying material was provided the Secretary diligently pursued the information. (R. 91.) There is no

reason to think that the ALJ could have succeeded where counsel failed. In these circumstances, the ALJ did not violate her duty to develop the record. See Brown v. Heckler, 713 F.2d 441, 443 (9th Cir. 1983).

Moreover, the Secretary's finding of no coverage during the years 1952-5 is supported by substantial evidence. The Secretary's records did not show wages paid to Dueñas in those years. The absence of a record of wages is evidence that the alleged wages in fact were not paid, 42 U.S.C. § 405(c)(3), and where the record stands uncorrected for a sufficient period of time as here, the absence of a record of wages creates a presumption that "no such alleged wages were paid to such individual in such period." 42 U.S.C. § 405(c)(4)(8). Dueñas' vague and

uncorroborated claim of sporadic employment in these years failed to rebut this presumption. See Singer v. Weinberger, 513 F.2d 176, 177 (9th Cir. 1975).

Second, as to alleged employment by Legorreta, the record contains numerous contradictory statements by Legorreta and Dueñas. For example, Legorreta stated that he employed Dueñas during 1986, 1988, and 1989, but in his application for employment Dueñas stated that he had not worked at any time during the period 1986 through April 1988. Also Legorreta supplied two declarations in which he listed precise amounts paid to Dueñas in various years. At the hearing, however, he admitted that these were just approximations. The ALJ heard from the witnesses and was in the best position to

judge their credibility. See Hudson v. Bowen, 849 F.2d 433, 434 (9th Cir. 1988). Substantial evidence in the record supports the Secretary's finding that Dueñas failed to establish employment in 1978, 1980, 1983, 1986, 1988, or 1989.[5]

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[5]After the magistrate judge filed the report and recommendations, Dueñas submitted objections in which he argued, for the first time, that if he were not Legorreta's employee then he was self-employed during the relevant years. The magistrate judge found that this argument was untimely and refused to consider it. The argument is again advanced on appeal. Even were the argument timely, however, Dueñas fails to address the conclusive presumption of no coverage which arises from the absence of any entry in the Secretary's record of self-employment wages paid in the relevant years. 42 U.S.C. § 405(c)(4)(C). Moreover, his new claim of self-employment is directly contradicted by his application. In light of the contradictory statements by Dueñas and Legorreta, as well as the only vague evidence of income and employment, resting on the suspect recollection and credibility of the claimant and his cousin, the ALJ's finding that Dueñas had failed to show the receipt of any wages during the relevant years is supported by substantial evidence in the record. This

Finally, the Secretary's finding that the statement by Mendoza did not establish coverage for two quarters in 1984 is supported by substantial evidence. Mendoza's statement was unsworn, verified only by a notary public, and addressed to whom it may concern. It was submitted to the Appeals Council more than three years after the submission of Dueñas' application for benefits and almost seven years after the alleged dates of employment. In these circumstances, the Secretary properly concluded that Mendoza's statement was insufficient to establish that Dueñas was paid wages in 1984.

After reviewing the administrative record as a whole, we conclude that the

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finding addresses both Dueñas' claim of employment by Legorreta and his new claim of self-employment.

proper legal standards were applied and that the Secretary's decision denying benefits is supported by substantial evidence. The judgment of the district court is AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

ANTONIO DUEÑAS 91-6301-JSL(EE)	)	No.CV)
Plaintiff	)	
v.	)	JUDGMENT
LOUIS W. SULLIVAN, Secretary of Health and Human Services,	)	
Defendant.	)	

IT IS HEREBY ADJUDGED that judgment is entered in favor of the defendant Secretary and against the plaintiff, affirming the Secretary's decision and dismissing the action.

DATED: October 21, 1992.

/s/ J. Spencer Letts

United States District Judge

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

ANTONIO DUEÑAS, Plaintiff, v. LOUIS W. SULLIVAN, Secretary of Health and Human Services, Defendant.	NO. CV 91-6301-JSL (EE) ORDER ADOPTING FINDINGS, CONCLUSIONS, AND RECOMMENDATIONS OF UNITED STATES MAGISTRATE JUDGE

The Court, having reviewed the complaint and other papers herein pursuant to 28 U.S.C. §636 (b)(1)(B), hereby approves the attached Report and Recommendation of the United States Magistrate Judge and adopts the findings, conclusions, and recommendations therein.

IT IS ORDERED that Judgement be

entered in favor of the Secretary and against the plaintiff, affirming the Secretary's decision and dismissing the action.

IT IS FURTHER ORDERED that the Clerk serve copies of this Order and the Judgment herein by United States mail on Plaintiff and counsel for Defendant.

DATED: October 21, 1992.

/s/ J. Spencer Letts

United States District Judge

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

ANTONIO DUEÑAS,	)NO.CV91-6301-JSL (EE)
Plaintiff,	) FINAL REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE
Secretary of Health and Human Services,	)
Defendant.	)

This Final Report and Recommendation and the attached Report and Recommendation are submitted to the Honorable J. Spencer Letts, United States District Judge, pursuant to the provisions of 28 U.S.C. section 636(b)(1)(B) and General Order 194 of the United States District Court for the Central District of California.

On September 24, 1992, the Clerk

filed Notice Of Filing Of Magistrate Judge's Report And Recommendation And The Lodging Of Proposed Judgment, which was served on the parties together with copies of said Report and Recommendation.

Plaintiff has timely filed his objections to the Report and Recommendation. Having carefully read and considered the objections, the court finds no good reason for changing or modifying the recommendation in any respect. Plaintiff's objections do not persuade the magistrate judge that the administrative law judge's decision in this case was not based upon substantial evidencel.[1]

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[1] The court need not and does not consider the new argument raised by plaintiff for the first time in its objections to the magistrate judges's report and recommendation to the effect that if plaintiff was not an "employee" from 1952 to 1954, then he was "self-employed." Moreover, no authority

IT IS THEREFORE THE FINAL RECOMMENDATION that the court approve these Reports and Recommendations and enter judgment in favor of the defendant Secretary and against the plaintiff, affirming the Secretary's decision and dismissing the action.

DATED: October 5, 1992.

ELGIN EDWARDS

UNITED STATES MAGISTRATE JUDGE

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is cited for the novel proposition that one can now claim benefits based on an alleged self-employment 40 years ago during which the self-employed person made no payments to Social Security.

APPENDIX C

C1

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

ANTONIO DUEÑAS,	NO. CV 91-6301-JSL (EE)
Plaintiff	REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE
v.	
LOUIS W. SULLIVAN, Secretary of Health and Human Services,	
Defendant.	

This report and recommendation is submitted to the Honorable J. Spencer Letts, United States District Judge, pursuant to the provisions of 28 U.S.C. section 636 and General Order 194 of the United States District Court for the Central District of California.

1. Summary of Proceedings.

Plaintiff, represented by counsel, timely brought this action seeking judicial review of the denial of his claim for old-age (retirement) insurance benefits ("benefits"). Plaintiff and defendant filed cross-motions for summary judgment, and the matter was submitted after oral argument.

2. Background.

It is not disputed that plaintiff was an American citizen born of Mexican parents who lived most of his working life in Mexico. Plaintiff came from time to time to the United States to work seascnally. (Administrative Record ("R") 40-41, 75). Plaintiff reached the age of 62 in 1988 and applied for benefits on April 21, 1988. (R 71-76). In order to be a "fully insured individual," he needs

to establish 37 quarters of coverage.[1]

After an initial hearing at which plaintiff did not testify, the Administrative Law Judge ("ALJ") denied the claim. (R 27). The Appeals Council remanded the matter to the ALJ because of an error of law. (R 18-20). The ALJ determined, after supplemental hearing, that plaintiff had only 33 of the 37 quarters of coverage he needed to establish "fully insured individual" status and that, consequently, he was not entitled to benefits. (R 11-15).

3. Issue For Decision.

Plaintiff appeals the denial of benefits. The parties agree that

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[1]One quarter for each year after 1950 and before 1988, the year in which plaintiff turned 62. U.S.C. §§ 402(a) & 414(a) 20 C.F.R. 55 404.310, 404.110(b)(2) & 404.115(b).

plaintiff needs 37 quarters of coverage during the period 1950-1987 to be entitled to benefits. The parties also agree that the Secretary's records show that plaintiff has only 33 quarters of coverage.

Plaintiff contends that he worked at least four additional quarters, but that his employers did not contribute to Social Security. The Secretary concedes that if plaintiff can prove that he was so employed for four additional quarters, he is entitled to benefits, even though those employers did not contribute to Social Security.

4. Standard of Review.

Under 42 U.S.C. § 405 (g), the Secretary's denial of benefits should only be disturbed if it is not supported by the correct legal standards or the substantial

evidence of record. Keves v. Sullivan, S94 F.2d 1053, 1055 (9th Cir. 1990). Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Richardson v. Perales, 402 U.S. 389, 401 (1971). It is more than a mere scintilla but less than a preponderance of the evidence. Id.

5. Discussion.

There are three periods of alleged employment from which plaintiff may potentially qualify for four additional quarters of coverage:

1) 1952-1954, during which plaintiff claims he was engaged in various agricultural jobs throughout the country;

2) 1978, 1980, 1983, 1986, 1988 and 1989, during which plaintiff contends that he was employed from time to time by his

cousin Roberto Legoretta; and

3) August through September. 1984, during which plaintiff claims to have been employed by one Manuel Mendoza.

A. 1952 through 1954.

Plaintiff has not established that he is entitled to additional quarters of coverage for this period. The only evidence he presents is a September 19, 1988, letter drafted by him which sets forth a narrative account of jobs he now claims he held over 35 years ago, between 1952 and 1954. (R 78-79). The letter does not specify even the names of employers or dates of employment, but simply recounts names of cities and makes vague references to the crops harvested. Plaintiff provides no other corroboration for his claim of employment during this period.

Plaintiff cites Brown v. Heckler, 713 F.2d 441 (9th Cir. 1983) and other cases for the proposition that the ALJ did not fully and fairly develop the record on this issue. However, the plaintiff does not suggest what more the ALJ could have done. The ALJ considered the evidence and found it insufficient to support a finding of employment. The magistrate judge agrees. Moreover, plaintiff's counsel was present with plaintiff at both the hearings and did not request further inquiries on this issue by the ALJ. The attorney suggested at the first hearing on April 25, 1990, that she might try to find the employers (R 41), but no additional evidence was offered either then or at the later hearing on remand on March 28, 1991.

There was no error by the ALJ.[2]

B. Work with Roberto Legoretta.

Plaintiff is not entitled to additional quarters of coverage for his alleged work with Mr. Legoretta. After the initial hearing, plaintiff submitted a form to the ALJ purporting to show that Mr. Legoretta was a general contractor and had employed plaintiff during the years at issue. (R 105-107). In response to interrogatories sent by the ALJ, Mr. Legoretta stated that plaintiff and he

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[2]plaintiff contends that the Social Security Administration at one time erroneously categorized plaintiff as a "foreign agricultural worker under contract" and thus applied an improper standard to determine his eligibility for benefits. Assuming that were true, it does not affect the magistrate judge's recommendation, because, as noted above, unless plaintiff can prove 4 additional quarters of employment, he is not entitled to benefits under the concededly correct standard for U.S. citizens.

were cousins and that he had no records to substantiate the amounts earned by plaintiff during the years in question, and his response made it evident that he had merely guessed at the figures set forth on the original form. (R 110). This information received from Mr. Legoretta directly contradicts statements which plaintiff made on his original application for benefits that he had done no work and earned no wages during the years 1986-1988. (R 71-76). Moreover, when questioned under oath at the supplemental hearing, Mr. Legoretta conceded that he was himself a day worker who was employed "on the corner of the street," for somebody to "pick [him] up" for cleaning jobs. (R 55). Legoretta had never employed anyone else (R 58), and could not employ anyone legally, because

he has no license to do so. (R 59). Mr. Legoretta also testified that when the plaintiff helped him on a job, Legoretta would share the money received for the job equally with plaintiff. (R 60).

There is a substantial basis on which to conclude that plaintiff was never Mr. Legoretta's employee. The ALJ's conclusion is more than adequately supported by the record.

C. Employment with Manuel Mendoza.

Plaintiff is not entitled to additional quarters of coverage based upon his alleged employment with one Manuel Mendoza. Plaintiff's only evidence of this employment is an undated letter purporting to be from Mendoza "to whom it may concern." It was not signed under oath or under penalty of perjury, and there is nothing about it that would

suggest that it was reliable. (R 114). No other records of wages earned were presented. Given this extremely thin evidence, it is clear that the ALJ had a substantial basis for his conclusion.

6. Recommendation.

For the foregoing reasons, IT IS RECOMMENDED that the Court approve this report and Recommendation, deny plaintiff's motion for summary judgment with prejudice, and grant defendant's cross-motion.

DATED: September 23, 1992.

ELGIN EDWARDS

UNITED STATES MAGISTRATE JUDGE

APPENDIX D

D1

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ANTONIO V. DUEÑAS, Petitioner-Appellant	*	No. CV 92-56566
	*	D.C. No.
	*	CV91-6301-JSL (EE)
V.	*	
DONNA E. SHALALA, Secretary, of Health and Human Services, Respondent-Appellee	*	

Before:KOZINSKI and TROTT, Circuit Judges, and LEVI,* District Judge.

Appellant's motion to recall the mandate is granted. His petition for rehearing is accepted for filing, and is hereby denied.

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* The Honorable David F. Levi, United States District Judge for the Eastern District of California, sitting by designation.